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No. 86-1906

# In the Supreme Court of the United States

OCTOBER TERM, 1987

REGINALD J. HOLZER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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Petitioner, a former state court judge who repeatedly extorted money from lawyers appearing before him, contends that the court of appeals erred in affirming his mail fraud conviction, which was based on the theory that petitioner deprived the citizens of his state of their intangible right to his honest services.

1. After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 23 counts charging mail fraud, in violation of 18 U.S.C. 1341, three counts charging extortion, in violation of 18 U.S.C. 1951 (the Hobbs Act), and one count charging a violation of 18 U.S.C. 1962, part of the Racketeer Influenced and Corrupt Organization Act (RICO). He was sentenced to concurrent terms of 18 years' imprisonment on the RICO and Hobbs Act counts and five years' imprisonment on the mail fraud counts. The court of appeals affirmed (Pet. App. A1-A14).

Petitioner's prosecution developed out of the "Greylord" investigation. The evidence at trial, summarized in the opinion of the court of appeals (Pet. App. A2-A5), showed that while he was a trial judge in the Cook County court of general jurisdiction, petitioner

asked a number of attorneys appearing before him for help in obtaining loans. Some of the attorneys made loans to petitioner out of their own pockets; other guaranteed loans by banks. The court of appeals characterized these transactions as "thinly disguised bribes" (*id.* at A7). Petitioner did not list the attorneys from whom he borrowed money as creditors on the annual ethics statements that he was required to file, nor did he identify any potential conflicts of interest arising out of the transactions (*id.* at A5).[1]

In affirming petitioner's mail fraud conviction, the court of appeals noted that petitioner's "conduct caused no demonstrable [financial] loss either to a litigant or to the public at large" (Pet. App. A8). However, the court concluded, petitioner's "appalling betrayal of the public trust" (*id.* at A13) deprived the citizens of their intangible right to his honest services (*id.* at A8). In response to petitioner's challenge to the intangible rights mail fraud theory, the court added that it "is too well established in the courts of appeals for us to disturb" (*id.* at A11). The court also affirmed petitioner's convictions on the RICO and Hobbs Act counts.

2. After the petition was filed, this Court held in *McNally* v. *United States*, No. 86-234 (June 24, 1987), slip op. 10, that the mail fraud statute does not prohibit deprivations of intangible rights, but is instead "limited in scope to the protection of property rights." The Court specifically noted, in concluding that the mail fraud convictions in *McNally* could not stand, that "the jury was

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[1] Although petitioner states (Pet. 3-4) that the Illinois Supreme Court rules governing judicial conduct do not require disclosure to litigants of loans or the acceptance of assistance in obtaining loans, petitioner fails to note that Illinois Supreme Court Rule 68 requires judges to file annual reports listing creditors to whom they owe more than $1,000 and also listing all potential conflicts of interest. See Pet. App. A5. It is undisputed that petitioner omitted from his annual Rule 68 statements the loans he obtained and any mention of the resulting potential conflicts of interest.

not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). Accordingly, the court of appeals' decision affirming the mail fraud counts appears to be contrary to this Court's decision in *McNally*.[2]

There is no warrant for plenary review by this Court, since there is no merit to petitioner's contentions other than his attack on the intangible rights mail fraud theory. Petitioner's suggestion (Pet. 10-11) that the court of appeals affirmed on a bribery theory rather than on the intangible rights mail fraud theory presented to the jury is frivolous. The court did not conclude that the receipt of bribes establishes mail fraud, but instead held that petitioner's concealment of the loans he extorted from the public was fraudulent (Pet. App. A8).

Petitioner also argues (Pet. 11-12) that the trial court erred in permitting the attorneys who made loans to him to testify that they had been investigated by the Illinois Attorney Registration and Disciplinary Commission and that they were testifying under grants of federal immunity. The court of appeals properly described this argument as frivolous (Pet. App. A8). It is settled that the admission of such evidence is within the discretion of the district court, whose decision is accordingly subject to review only for abuse. See, *e.g.*, *United States* v. *Carter*, 720 F.2d 941, 947-948 (7th Cir. 1983). Here the trial court did not abuse its discretion in permitting this evidence to be elicited during the witnesses' direct examination, particularly in light of petitioner's intent to cross-examine some of them on the matter. Allowing examination of some but not other witnesses concerning immunity would have led the jury to conclude improperly that the government was not concerned about the actions of those witnesses not questioned

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[2] The petition does not challenge petitioner's convictions on the Hobbs Act or RICO counts.

about immunity. Moreover, it does not appear that petitioner was damaged by the trial court's actions. The court instructed the jury that the immunized witnesses' testimony should be examined with great care. Far from bolstering their testimony, the evidence coupled with the instruction informed the jury that the credibility of those witnesses was open to dispute. Petitioner cites no conflicting cases suggesting that what the trial court did was improper.

It is respectfully submitted that the Court should grant the petition, vacate the judgment below, and remand the case to the court of appeals for reconsideration in light of *McNally* v. *United States*, No. 86-234.

CHARLES FRIED
*Solicitor General*

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